No. 84-68 (18)

IN THE
SUPREME COURT OF THE UNITED STATES

OCTOBER TERM 1984

KERR-McGEE CORPORATION,

PETITIONER,

-vs-

NAVAJO TRIBE OF INDIANS,

RESPONDENTS.

ON WRIT OF CERTIORARI TO
THE UNITED STATES COURT OF APPEALS FOR
THE NINTH CIRCUIT

BRIEF OF AMICUS CURIAE
SAC AND FOX TRIBE OF INDIANS OF OKLAHOMA

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of Indians of Oklahoma

December 26, 1984

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The Sac and Fox Tribe of Indians of Oklahoma respectfully submits this brief as amicus curiae in support of the position of respondent Navajo Tribe of Indians. Written consent for the filing of this brief has been mailed by both parties and will be forwarded for filing upon receipt.

INTEREST OF AMICUS CURIAE

The Sac and Fox Tribe of Indians of Oklahoma is a federally recognized tribe of Indians located in the State of Oklahoma. The Sac and Fox Tribe of Indians of Oklahoma (hereinafter referred to as the Sac and Fox Tribe) has adopted a written Constitution approved by the Secretary of the Interior pursuant to the Oklahoma Indian Welfare Act, Act of June 26, 1936, Ch. 831, §3, 49 Stat. 1967, codified at 25 U.S.C.A. §503.

Pursuant to this Constitution, the Legislature of the Sac and Fox Tribe has enacted a myriad of ordinances which regulate the conduct of both members and non-members within the Indian Country subject to the jurisdiction of the Sac and Fox Tribe. Some of those ordinances include a Business Corporation Act, providing for the incorporation and domestication of corporations within the tribal jursidiction, a Grievance Committee Procedure Act, providing for the removal or discipline of elected tribal officers under certain conditions, a

Bingo Ordinance, providing for the licensing and regulation of bingo activities within the tribal jurisdiction, a Mineral Leasing Act, regulating the execution, operations, and terminations of leases of tribally owned minerals including oil and gas, and a General Revenue and Taxation Act, providing for the levy, administration, and collection of tribal taxes upon such things as tobacco, sales of personal property, employee's earnings, possessory interests such as leases in tribal or individual trust lands, the severance of oil and gas from Indian lands, the net receipts of licensed bingo operators, and motor vehicles. These taxes apply to all persons and property located within the Indian country subject to the jursidiction of the Sac and Fox Tribe, and are paid by both Indians and non-Indians alike. The funds received from tax revenues are expended exclusively for the expenses of the tribal government in providing services such as governmental administrative expenses, police protection, fire protection, road maintenance, and similar expenses utilized by all taxpayers within the tribal jurisdiction. The Legislature of the Sac and Fox Tribe has regularly waived its

sovereign immunity into the Courts of the Tribe in these ordinances, and have authorized the Tribal Court to protect the rights of all persons against actions of tribal executive and legislative officers.

The Constitution of the Sac and Fox Tribe, as approved by the Secretary of the Interior, contains no requirement that any ordinance of the Legislature of the Tribe be approved by the Secretary of the Interior. In adopting tribal legislation, the tribal Legislature regularly submits tribal legislation, at some stage of the tribal legislative process to the agents of the Secretary of the Interior for their information, review, and comments. However, the Secretary has repeatedly expressed to the Sac and Fox Tribe his determination that it is not only unneccessary but also inappropriate for his office to approve the general legislation of the Sac and Fox Tribe, in the absense of a statutory or tribal constitutional requirement for his approval.

Due to the lack of any express requirement in tribal law or federal statutory law that the Secretary of the Interior approve general tribal legislation, and the specific

determination by the Secretary that his approval was not required in order for this legislation to be valid, none of the general legislative enactments of the Sac and Fox Tribe has been approved by the Secretary of the Interior. A decision of this Honorable Court requiring Secretarial approval of tribal legislative enactments in the absence of a specific tribal or Congressional requirement for such approval would literally wipe all Sac and Fox Tribal legislation from the books, create immediate chaos in the area of law enforcement and tribal government, and cause the disintegration of the legal foundation for every economic activity within the tribal jurisdiction. The Sac and Fox Tribe has an essential and compelling interest in the maintenance of law and order and the regulation of and authorization for business and personal activities of persons within the jurisdiction of the Tribe in order to provide for and promote the peace, safety, and welfare of all persons who live, work, or otherwise enter into the tribal jurisdiction having a significant relationship to the Sac and Fox Tribe or its members. For these reasons, the Sac and Fox Tribe has an essential and compelling

interest in this case arising out of an unprincipled challenge to the rights of a tribal government to require a business corporation to contribute its fair share to the expenses of maintaining a civilized society within which it can conduct its business operations for profit.

SUMMARY OF ARGUMENT

The Navajo Tribe of Indians is a federally recognized Indian Tribe having a long standing treaty relationship with the political departments of the United States Federal Government. Within the context of this relationship, the authority of the Navajo Tribe to tax all entities, including legal persons such as corporations, who conduct business activities within the tribal jurisdiction has never been limited. Nor has any requirement that legislative enactments of the Navajo Tribe relating to taxation must be approved by the Secretary of the Interior, or any other federal agent, been agreed to by treaty, nor imposed by any federal statute enacted by the Congress.

No one forces oil companies or others to enter into the jurisdiction of the Tribe to conduct their business

activities. Oil companies cannot complain that they have no remedy simply because they refuse to exercise the remedies available to them pursuant to tribal law. Kerr-McGee Corporation has exactly the same rights and remedies as a business corporation formed by Indians pursuant to Navajo law would have, and somehow believes that this Court, in the absence of any statutory requirement therefore, should condone a position in which there is one rule for corporations with Indian stockholders, another for corporations with non-Indian stockholders, and perhaps another rule for corporations with both Indian and non-Indian stockholders. Such a position is untenable.

In the absence of a specific requirement in either federal or tribal law that Navajo Tribal legislation relating to taxation be approved by the Secretary of the Interior, no such requirement exists, and the Navajo tribal taxes at issue here are valid and enforceable.

ARGUMENT

PROPOSITION I.

INDIAN TRIBES ARE SOVEREIGN ENTITIES ENTITLED TO EXERCISE THE AUTHORITY TO TAX ALL PERSONS AND PROPERTY WITHIN THE INDIAN COUNTRY SUBJECT TO THEIR JURISDICTION IN ORDER TO PROVIDE GOVERNMENTAL SERVICES WITHIN THEIR TERRITORIAL JURISDICTION.

It is beyond cavil that the lands within the Navajo Indian Reservation, irrespective of any rights of possession or user, are Indian Country. 18 U.S.C. §1151. While the term "Indian Country" has been used in many different senses, it has traditionally been defined as country within which Indian tribal laws, whether express legislative enactments or tribal law in the form of traditional usages and customs, and federal laws relating to Indians are generally applicable to the exclusion of state laws. F. Cohen, **Handbook of Federal Indian Law**, 5 (1942). Felix Cohen, the noted Indian law scholar previously recognized

by this Court as the emminent authority in the field,[1] reviewed the historical development of the term Indian Country, Id. at pages 5 and 6:

> The Indian country at any particular time must be viewed with reference to the existing body of federal and tribal law. Until 1817, it is country within which the criminal laws of the United States are not generally applicable, so that crimes in the Indian Country by white against whites, or by Indians, are not cognizable in state or federal courts any more than crimes committed on the soil of Canada or Mexico. Treaties defined the boundaries between the United States, or the seperate states, and the territories of the various Indian Tribes or nations. Within these territories the Indian tribes or nations had not only full jurisdiction over their own citizens, but the same jurisdiction over citizens of the United States that any other power might lawfully

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1. Squire v. Capoeman 351 U.S. 1, 8-9 (1956).

exercise over emigrants from the United States.[2] Treaties between the United States and various tribes commonly stipulated that citizens of the United States within the territory of the Indian nations were subject to the laws of those nations.[3]

and futher:

> Indian country in all these statutes [the original federal legislation defining the Indian country and extending certain aspects of federal law to certain persons or property therein] is territory, wherever situated, within which tribal law is generally applicable, federal law is applicable only in special cases designated by the statute, and state law is not applicable at all. This conception of the Indian country reflects a situation which finds its counterpart in international law in the case of newly acquired territories, where the laws of those territories continue in force until repealed or modified by the new sovereign.

It is, therefore, clear that the question of whether an Indian tribe has the authority to tax corporations doing business within the Indian Country subject to the jurisdiction of that Tribe absent Secretarial approval must be determined in light of this historical understanding and the current federal policy of tribal self-determination and limitation of federal involvement in the affairs of the Tribes.

The most basic principle of Indian law, supported by a host of decisions, is that those powers which are lawfully vested in an Indian tribe are not, in general, delegated powers granted by express acts of Congress, but rather inherent powers of a limited sovereignty which have never been extinguished. The statutes of Congress then, must be examined to determine the express limitations placed upon tribal sovereignty rather than to

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2. It is interesting to note in this connection that some of the early Trade and Intercourse Acts contained a provision requiring a citizen or inhabitant of the United States to acquire a passport before going into the country secured by treaty to the Indians. Act of May 19, 1796, 1 Stat. 469; Act of March 3, 1799, 1 Stat. 743; Act of March 30, 1802, 2 Stat. 139 . . . .

3. Treaty of January 21, 1785, with Wiandot, Delaware, Chippewa, and Ottawa Nations, 7 Stat. 16; Treaty of November 28, 1785, with the Cherokees, 7 Stat. 18; Treaty of January 3, 1786, with the Choctaw Nation, 7 Stat. 21; Treaty of January 10, 1786, with the Chickasaw Nation 7 Stat. 24; Treaty of January 31, 1786 with the Shawanoe Nation, 7 Stat. 26; Treaty of January 9, 1789, with the Wyandot, Delaware, Ottawa, Chippewa, Pattawattima, and Sac Nation, 7 Stat. 28; Treaty of August 7, 1790, with the Creek Nation, 7 Stat. 35; Treaty of July 2, 1791, with the Cherokee Nation, 7 Stat. 39; Treaty of August 3, 1795, with the Wyandots, Delawares, Shawanoes, Ottawas, Chipewas, Putawatimes, Miamis, Eel River, Wees's, Kickapoos, Piankashaws, and Kaskaskias, 7 Stat. 49.

determine its sources or positive content. Cohen, **Handbook of Federal Indian Law** 122, (1945); **Merrion v. Jicarilla Apache Tribe**, 455 U.S. 130, 71 L.Ed.2d 21 (1982)(inherent power to tax, regulate, and exclude non-Indians); **Montana v. United States**, 450 U.S. 544, 67 L.Ed.2d 493 (1981)(inherent power to exercise civil jurisdiction and regulate non-Indian activities on Indian lands, including leases); **Washington v. Confederated Tribes**, 447 U.S. 134, 65 L.Ed.2d 10 (1980)(inherent power to tax); **United States v. Wheeler** 435 U.S. 313, 55 L.Ed.2d 303 (1978)(power to exercise criminal jurisdiction over Indians); **Santa Clara Pueblo v. Martinez**, 436 U.S. 49, 56 L.Ed.2d 106 (1978)(membership, and immunity from suit by reason of sovereign immunity); **Roff v. Burney** 168 U.S. 218, 42 L.Ed 442 (1897)(membership); **Jones v. Meehan** 175 U.S. 1, 44 L.Ed 49 (1899)(inheritance); **United States v. Quiver** 241 U.S. 602, 60 L.Ed 1196(1916)(domestic relations); **Worcester v. Georgia** 31 U.S.(6 Pet.) 515, 8 L.Ed 483 (1832)(power to exclude nonmembers).

Indian tribes, as distinct political communities retaining their original natural rights of self-government, remain a separate people with the power of regulating both their members and other persons or entities within their territory when the nonmembers have significant impact on the tribe or its members. **Worcester v. Georgia**, 31 U.S. (6 Pet.) 515, 8 L.Ed 483 (1832); **United States v. Mazurie** 419 U.S. 544, 42 L.Ed.2d 706 (1975); **United States v. Kagama** 118 U.S. 375, 30 L.Ed 228 (1886); **United States v. Wheeler** 435 U.S. 313, 55 L.Ed.2d 303 (1978); **Santa Clara Pueblo v. Martinez** 436 U.S. 49, 56 L.Ed.2d 106 (1978); **Montana v. United States** 450 U.S. 544, 67 L.Ed.2d 493 (1981); **Washington v. Confederated Tribes** 447 U.S. 134, 65 L.Ed.2d 10 (1980); **Merrion v. Jicarilla Apache Tribe** 455 U.S. 130, 71 L.Ed.2d 21 (1982); F. Cohen, **Handbook of Federal Indian Law** 122-23 (1942).

The inherent power to tax, regulate, and exclude non-Indians has been consistently upheld, and the widely held understanding of the federal government has always been that federal laws have not worked a divestiture of

such powers. **Worcester v. Georgia** 31 U.S. (6 Pet.) 515, 8 L.Ed 483 (1832); **Jones v. Meehan** 175 U.S. 1, 44 L.Ed 49 (1899); **Washington v. Confederated Tribes** 447 U.S. 134, 152-53, 65 L.Ed.2d 10, 28-29 (1980); **Montana v. United States** 450 U.S. 544, 565-66, 67 L.Ed.2d 493, 510-11 (1981); **Merrion v. Jicarilla Apache Tribe** 455 U.S. 130, 71 L.Ed.2d 21 (1982); **Snow v. Quinault Indian Nation**, 709 F.2d 1319 (9th Cir. July 7, 1983) Cert denied, 81 L.Ed.2d 362 (1984); **Babbit Ford v. Navajo Indian Tribe** 710 F.2d 587 (9th Cir. 1983); **Southland Royalty Company v. Navajo Tribe of Indians**, 715 F.2d 486 (10th Cir. 1983).

The outgrowth of this historical and decisional perspective is the repeated determination that Indian Tribes have the inherent authority to enforce their own laws in their own forums as to both Indians and non-Indians. **Williams v. Lee** 358 U.S. 217, 3 L.Ed.2d 251 (1959); **Fisher v. District Court** 424 U.S. 382, 47 L.Ed.2d 106 (1976); **Santa Clara Pueblo v. Martinez** 436 U.S. 49, 56 L.Ed.2d 106 (1978); **Merrion v. Jicarilla Apache Tribe** 455 U.S. 130, 71 L.Ed.2d 21 (1982); **Cardin v. De La Cruz** 671 F.2d 363 (9th Cir.

1982) cert. den. 74 L.Ed.2d 277 (1982); **New Mexico v. Mescalero Apache Tribe** __ U.S. __, 76 L.Ed.2d 611 (1983); **White v. Pueblo of San Juan** 728 F.2d 1307 (10th Cir. 1984).

Within the Indian Country, the repeated litigation in this, and other courts, has clearly shown that Indian Tribes may regulate, through taxation, licensing, or other means, the activities of non-Indians who enter consensual relationships with the tribe or its members through commercial dealing, contracts, leases, or other arrangements and clearly may do so where the conduct of the non-Indian threatens or has a direct effect on the political integrity, economic security, or the health and welfare of the tribe. **Merrion v. Jicarilla Apache Tribe** 455 U.S. 130, 71 L.Ed.2d 21 (1982); **Montana v. United States** 450 U.S. 544, 565-66, 67 L.Ed.2d 493, 510-11 (1981); **Washington v. Confederated Tribes** 447 U.S. 134, 153-55, 65 L.Ed.2d 10, 28 (1980); **Williams v. Lee** 358 U.S. 217, 3 L.Ed.2d 251 (1959); **Morris v. Hitchcock** 194 U.S. 384, 48 L.Ed 1030 (1904); **Fisher v. District Court**

424 U.S. 382, 47 L.Ed.2d 106 (1976); **Buster v. Wright** 135 F. 947 (8th Cir. 1905) appeal dism. 203 U.S. 599, 51 L.Ed 334 (1906); **Maxey v. Wright** 34 S.W. 807 (Ct. App. Ind. Terr.) aff'd. 105 F. 1003 (8th Cir. 1900); **Barta v. Oglala Sioux Tribe** 259 F.2d 553 (8th Cir. 1958); **Trans-Canada Enterprises, Ltd v. Muckleshoot Indian Tribe** 634 F.2d 474 (9th Cir. 1980); **Cardin v. De La Cruz** 671 F.2d 363, 366 (9th Cir. 1982) cert. den. 459 U.S. 967, 74 L.Ed.2d 277 (1982); **Knight v. Shoshone and Arapaho Tribes** 670 F.2d 900 (10th Cir. 1982); **Ortiz-Barraza v. United States** 412 F.2d 1176, 1179 (9th Cir. 1975); **Confederated Salish and Kootenai Tribes v. Namen** 665 F.2d 951, 963-64 (9th Cir. 1982); **Colville Confederated Tribes v. Walton** 647 F.2d 42 (9th Cir. 1981).

When considering whether any particular legislation imposes limitations upon the governing authority of Indian Tribes, except the authority to enter into relationships with foreign sovereigns without the consent or the United States - a limitation found in most Indian treaties, that legislation or treaty must be liberally contrued in the

interest of the Tribe, and doubtful expressions resolved in its favor. **Northern Cheyenne Tribe v. Hollowbreast** 425 U.S. 649, 48 L.Ed.2d 294 (1976); **DeCoteau v. District County Court** 420 U.S. 425, 43 L.Ed.2d 300, 314 (1975); **McClanahan v. Arizona Tax Commission** 411 U.S. 164, 36 L.Ed.2d 129 (1973); **Alaska Pacific Fisheries v. United States** 248 U.S. 78, 63 L.Ed. 138 (1916); **Choate v. Trapp** 224 U.S. 665, 56 L.Ed 941 (1912); **United States v. Celestine** 215 U.S. 278, 54 L.Ed 195 (1905); **Santa Clara Pueblo v. Martinez** 436 U.S. 49, 56 L.Ed.2d 106 (1978); **Merrion v. Jicarilla Apache Tribe** 455 U.S. 130, 71 L.Ed.2d 21 (1982).

PROPOSITION II.

TRIBES ARE NOT REQUIRED TO ADOPT THE INDIAN REORGANIZATION ACT OF 1934 IN ORDER TO TAX NON-INDIANS WITHOUT FEDERAL SUPERVISION AND APPROVAL.

None of the foregoing authorities in Proposition I, which paint with the broadest brush the fullness of the cornucopia of inherent tribal authority over persons and

property within the Indian Country jurisdiction of an Indian Tribe, contain any requirement that the tribal government be modeled in any particular form, or that tribal legislative actions be reviewed by the Secretary of the Interior in the absence of an explicit treaty provision, statute, or some other explicit provision of the internal laws of the particular Tribe involved. It has, in fact, been said that the legal history of the Indian tribes covers a longer period and a wider range of variation than the constitutional history of the colonies, the states, and the United States:

> It was some time before the immigrant Columbus reached these shores, according to eminent historians, that the first Federal Constitution on the American Continent was drafted, the Gayaneshagowa, or Great Binding Law of the Five (later six) Nations (Iroquois). It was in this constitution that Americans first established the democratic principles of initiative, recall, referendum, and equal suffrage. In this constitution, also, were set forth the ideal of the responsibility of governmental officials to the electorate, and the obligation of the present generation to future generations which we call the principle of conservation.[4]

and further:

> From the earliest years of the Republic the Indian tribes have been recognized as "distinct, independent, political communities," and, as such, qualified to exercise powers of self-government, not by virtue of any delegation of powers from the Federal Government, but rather by reason of the original tribal sovereignty.
>
> . . . .
>
> In point of form it is immaterial whether the powers of an Indian tribe are expressed and exercised through customs handed down by word of mouth or through written constitutions and statutes. In either case the laws of the Indian tribe owe their force to the will of the members of the Tribe.

F. Cohen, **Handbook of Federal Indian Law**, p. 122.

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4. F. Cohen, Handbook of Federal Indian Law 128 (1942). Obviously, this constitution was not drafted in written form recognizable by the European immigrants who first contacted the League of the Five Nations. Just as obviously, neither this constitution, nor other similar constitutions or the laws of the various tribes involved were approved by any authority of the United States prior to their validity. This Constitution of the Iroquois Confederacy is still the basic instrument of government for most of the Six Nations Reservations now located within the State of New York.

Petitioner asserts that Indian Tribes not organized pursuant to the Indian Reorganization Act of 1934 (IRA) cannot tax non-Indians without federal supervision and approval. However, the Ninth Circuit Court of Appeals in **Kerr-McGee Corporation v. Navajo Tribe of Indians**, 731 F.2d 604, quoting from the Tenth Circuits decision in **Southland Royalty Co. V Navajo Tribe of Indian**, 715 F.2d 486, appropriately countered this off-beat assertion, at p. 603, by holding:

> The purpose of the IRA was to enable and encourage Indian self-government. Organization under the IRA was not the only form of self-government acceptable to Congress. One of the ways in which the IRA reflects a respect for self-government was in the provision that make adoption of a constitution optional. 25 U.S.C. §476. The choice of government is in itself an act of self-government and consonant with Congressional policies.

Petitioner's fail to recognize that when Congress has intended the result Petitioner urges—that the government of an Indian tribe be required to be in a particular form, or has determined to give the President

or the Secretary of the Interior general supervisory authority over the action of a Tribe's legislative or executive branches, it has explicitly so provided. See, Act of June 7, 1897, 30 Stat. 62, 84 (Five Civilized Tribes); Act of March 3, 1901, 31 Stat. 1058, 1077 (Five Civilized Tribes); Act of June 28, 1906, 34 Stat. 539, 545 (Osage Tribe).[5] In contrast, the plain language of the Indian Reorganization Act, 25 U.S.C. §476, imposes no requirements for the form of a tribal government, nor requires Secretarial approval of tribal ordinances whether a Tribe organizes pursuant to that, or any other act of

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5. It is interesting to note that the portions of the Osage Allotment Agreement which designate the form of government for the Osage Tribe and other specifics of its governmental organization were probably enacted, not is response to any perceived inadequacies in the tnen extant written Constitution and laws of the Osage Tribe, but in order to return a form of self-government to the Osage Tribe after the Secretary of the Interior had unilaterally and arbitrarily abolished the Osage tribal government in a series of ultra vires actions, **Logan v. Andrus** 457 F. Supp 1318 (W.D. Okla 1978), actiondescribed by federal courts in similar cases as "bureaucratic imperialism". **Harjo v. Kleppe** 420 F.Supp. 1110 (D.D.C. 1976); aff'd sub. nom. **Harjo v. Andrus** 481 F.2d 949 (D.C. Cir. 1978).

Congress, a non-Congressionally authorized written Constitution or other written laws, or continues to operate pursuant to a traditional form of government existing since time immemorial. Simply stated, neither the Indian Reorganization Act nor any other Act of Congress requires the Navajo Tribe of Indians to organize their government in any particular form.

PROPOSITION III.

THERE IS NO AUTHORITY FOR THE PROPOSITION THAT THE SECRETARY OF THE INTERIOR HAS OBTAINED PLENARY AUTHORITY OVER THE EXERCISE OF TRIBAL GOVERNMENTAL AUTHORITY IN DEROGATION OF THE FEDERAL CONSTITUTION, FEDERAL ADMINISTRATIVE PROCEDURE, AND THE RIGHT TO SELF GOVERNMENT RESERVED TO THE NAVAJO TRIBE.

In an incredible series of arguments, Petitioner, Kerr-McGee Corporation raises the spectre of Indian tribal governments run amuck and invites this Honorable Court to endorse an unprecedented rule of law holding that Indian tribes, through recognized by the executive, legislative and judicial branches of the United States as

having the authority to legislate and enforce civil laws within their jurisdiction are competent only to legislate and enforce civil laws governing non-Indians when some other non-Indian person or agency gives his blessing to such laws—all in the absence of any treaty, statutory, or Constitutional requirement for such blessing. Petitioner, by legal legerdemain, requests this Court to transform government by the Tribe into government by the Secretary of the Interior.

It is black letter hornbook law that administrative officers of the Executive Department of the Federal Government have only such authority as is not in excess of statutory jurisdiction, authority, or limitations, and that any actions of an administrative officer, such as the Secretary of the Interior, will be held unlawful and set aside if found to be ultra vires, 5 **U.S.C.** §706(2)(C).

The Secretary of the Interior, in fact, has explicity determined that he has no such authority respecting tribal ordinances taxing mineral production within the jurisdiction of the Tribe[6] unless there exists either (1) a statute of Congress explicitly granting approval authority over that Tribe or the subject matter; or (2) Constitutional or statutory authority from the Tribe itself granting him the power to approve the action in question. 83 B.I.A.M. 6.6B; "Guidelines for the Review of Tribal Ordinances Imposing Taxes on Mineral Activities", Bureau of Indian Affairs; **Southland Royalty Company v. Navajo Tribe of Indians** 713 F.2d 486 (10th Cir. 1983); **Knight v. Shoshone & Arapahoe Indian Tribes** 670 F.2d 900 (10th Cir. 1982);

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6. "The claim of administrative officers to plenary power to regulate Indian conduct has been rejected in every decided case where such power was not invoked simply to implement the administration of some more specific statutory or treaty provision." F. Cohen **Handbook of Federal Indian Law** 103 (1942). Petitioner is attempting to force upon the Secretary the administration and regulation of a field where (1) the Secretary has determined that he has no statutory authority to act, and (2) where the Secretary has indicated that it would be adverse to the Administration's Indian policy for him to affirmatively exercise the authority claimed for him even if it was within his discretion to do so.

Babbitt Ford, Inc. v. Navajo Indian Tribe 710 F.2d 587 (9th Cir. 1983). In its final report to the American Indian Policy Review Commission (1976), a Commission authorized by the Congress in Public Law 93-580, Task Force Two: Tribal Government, determined that the Secretary's authority to control the actions of Indian Tribes came from two sources, the trust responsibility for Indian trust property as delineated by federal statutes, and the constitutions of the Tribes themselves. The Report On Tribal Government stated at page 15:

> BIA or Interior Department authority over the actions of Indian Tribal Governments grounded upon provisions found in tribal constitutions must be viewed as a matter which concerns the individual tribe and is not an issue of Federal policy. Even though the Interior Department officials were responsible for drafting the model IRA constitution and for encouraging tribes to adopt constitutions which contained the "boilerplate" provision granting authority to the Secretary of Interior, it is clear that the tribes are not required under Federal law to submit their governments to this broad range of supervisory control. In recent times, a significant number of Indian tribes have amended their constitutions to delete completely any requirement that the tribal government submit any form of tribal action to the Secretary of Interior for his review and approval. Consequently, today it remains a matter of tribal initiative whether to allow for Secretarial review and approval of tribal action throught their constitution or change their law to be completely free of such tribally-conferred Federal supervision.

The Secretary's view on this subject is therefore in accord with the existing law.[7]

The Congress has explicitly directed the federal courts to limit the actions of federal agencies, including the Department of the Interior, to the authority

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7. "In the case of **Francis v. Francis** [203 U.S. 233 (1906)] the President, pursuant to a treaty reserving land to individual Indians and their heirs, issued a patent conveying a title with restrictions upon conveyance. The Supreme Court held ineffectual the restrictive clause because the 'President had no authority, in virtue of his office, to impose any such restriction; certainly not, without the authority of an act of Congress, and no such act was ever passed.'

The question of whether internal affairs of Indian tribes, in the absence of statute, are to be regulated by the tribe itself or by the Interior Department was squarely before the Supreme Court in the case of **Jones v. Meehan** [175 U.S. 1 (1899)]. One of the questions presented by that case [arising between and resulting from a dispute between white persons holding leases and conveyances of property of the Indian decedent from his heirs] was whether inheritance of Indian land, in the absence of statute, was governed 'by the laws, usages, and customs of the Chippewa Indians' or by the rules and regulations of the Secretary of the Interior. In line with numerous decisions of lower courts, the Supreme Court held that the Secretary of the Interior did not have the power claimed, and that in the absence of statute such power rested with the tribe and not with the Interior Department" — even though non-Indians were the claimants to the property. F. Cohen, **Handbook of Federal Indian Law** 102 (1942).

specifically conferred upon them by statute. In Section 706 of Title 5 of the United States Code Congress directed, in pertinent part:

> The reviewing court shall —
> . . . .
> (2) hold unlawful and set aside agency action, findings, and conclusions found to be —
> . . . .
> (B) contrary to constitutional right, power, privilege, or immunity;
> (C) in excess of statutory jurisdiction, authority, or limitation, or short of statutory right;
> . . . .

This Court has held, on more than one occasion, that prior to a federal agency having any authority to take an action it must be shown that the action is within the scope of the agency's authority, and that action taken outside the scope of explicitly delegated statutory authority is void. **FPC v. Transcontinental Gas Pipe Line Corp.** 423 U.S. 326, 331, 46 L.Ed.2d 533, 538 (1976); **Citizens To Preserve Overton Park v. Volpe** 401 U.S. 402, 415, 28 L.Ed.2d 136, 153 (1971); **Leedom v. Kyne** 358 U.S. 184, 188, 3 L.Ed.2d 210, 214 (1958); **United States ex rel. Accardi v. Shaughnessy** 347 U.S. 260, 266, 267, 98 L.Ed 681, 686 (1954); **Arrow-Hart & Hegeman Electric**

Company v. Federal Trade Commission 291 U.S. 587, 594, 598, 78 L.Ed 1007, 1011, 1013 (1934).

There is no cogent authority for the proposition that the Secretary of the Interior has obtained plenary authority over the exercise of tribal powers of self-government. In **Merrion v. Jicarilla Apache Tribe** 455 U.S. 130, 71 L.Ed.2d 21 (1982), a case upholding the Jicarilla Apache Tribe's inherent power to tax, regulate, and exclude non-Indians, this Court in stating that the tribal ordinance in question required approval by the

Secretary prior to being effective cited the Constitution and laws of the Jicarilla Apache Tribe. It is evident that the reasoning and source of authority for Secretarial approval was the Tribal constitutional requirement that the Secretary of the Interior approve such ordinances.[8] Also, the language of this Court in the **Merrion** case was

8. That this self-imposed limitation on tribal authority is purely voluntary with the Jicarilla Tribe, and not any general requirement of Federal Indian Law, note the constitutions of Tribes approved by the Secretary of the Interior pursuant to the Indian Reorganization Act, 25 U.S.C. §476, and the Oklahoma Indian Welfare Act, 25 U.S.C. §501, which by specific delegation of taxing authority or by general delegation of all inherent and statutory authority of the Tribes, vests the authority in the Tribal Legislatures to tax all persons without any requirement of Secretarial approval of the ordinances providing for such taxes: San Carlos Apache Tribe (1954), Article V, Section 1(k); Hualapai Tribe (1955), Article VI, Section 1(m); Pueblo of Laguna (1958), Article VI, Section 1(e)(4); Sac and Fox Tribes of Kansas and Nebraska (1937), Article V, Section 1(f); Apache Tribe of Oklahoma (1972 as amended through 1976) Article V; Fort Sill Apache Tribe of Oklahoma (1976 as amended through 1978) Article IV; Iowa Tribe of Kansas and Nebraska (1978) Article V, Section 1(i); Kickapoo Tribe of Kansas (1962) Article V, Section 1(f); Absentee Shawnee Tribe (1977) Article 5, Section 1; Citizen Band of Potawatomi Indians (1971) Article V, Section 2; Iowa Tribe of Oklahoma (1977) Article V, Section 2; Kickapoo Tribe of Oklahoma (1977) Article V, Section 1(a); Sac and Fox Tribe of Indians of Oklahoma (1967) Article V, Section 1.

dicta in that the tribe's constitution required Secretarial approval of its ordinances, the Secretary had in fact approved the ordinance in question, and no question was presented as to whether the Secretary had to approve the ordinance to render it valid in the absence of a tribal or congressional mandate that he do so. This statement was made in the context of answering a Commerce Clause challenge to the taxing authority of the Jicarilla Tribe.

Additionally, assumption of such powers by the Secretary of the Interior has always been condemned by the Courts and disapproved by Congress:

> The claim of administrative officers to plenary power to regulate Indian conduct has been rejected in every decided case where such power was not invoked simply to implement the administration of some more specific statutory or treaty provision. Cohen, **Handbook of Federal Indian Law** 103 (1945).

and further:

> This statute [25 **U.S.C.§2**] was obviously not intended to vest in the newly created office of the Commissioner of Indian Affairs the power to regulate Indian conduct generally . . . . The phrase 'management of all Indian affairs' clearly does not mean 'management of the affairs of Indians' any more than the phrase 'management of foreign affairs' means 'management of the affairs of foreign nations

> or of foreigners.' The phrases "Indian affairs" and "Indian relations" are intended to cover the relations between the United Sates and the Indian tribes, which relations are commonly established either by treaty or by statute'. **Id.** at 102, and the footnote references therein.

See, also, 55 **I.D.** 103 (August 24, 1942)(Holding that 25 **U.S.C.** §2, by and of itself, did not give any direct authority to the Secretary of Interior, but that section 2 must be read in conjunction with another expressed grant of authority); **Francis v. Francis** 203 U.S. 233, 242, 51 L.Ed 165, 168 (1906); **Morris v. Hitchcock** 194 U.S. 384, 48 L.Ed 1030 (19..); **Jones v. Meehan** 175 U.S. 1, 29, 44 L.Ed 49, 60 (1899); **Worcester v. Georgia** 31 U.S. (6 Pet.) 515, 8 L.Ed. 483 (1832); **Ex Parte Crow Dog** 109 U.S. 556, 27 L.Ed. 1030 (1883); **Logan v. Andrus** 457 F.Supp. 1318 (N.D.Okla.1978)(Secretary's attempt to abolish Osage power of self-government held void); **Harjo v. Kleepe** 420 F.Supp. 1110 (D.D.C. 1976)(Secretary's attempt to prevent Creek legislature from meeting stated to be "bureaucratic imperialism" and void) aff'd. sum. nom. **Harjo v. Andrus** 581 F.2d 949 (D.C.Cir. 1978).

The petitioner has stated that there must be some mechanism to determine when tribal actions are inconsistent with the national interests. That mechanism is now in force. The authority of congress to limit tribal powers of self-government by statute, not some implied authority for the Secretary of the Interior creating a phantasmagoria of limitations on the tribal power of self-government contrary to all prior case law, is available to affirmatively check unfair or unprincipled action's by tribal governments. **Santa Clara Pueblo v. Martinez** 426 U.S. 49, 56-57, 56 L.Ed.2d 106, 114 (1978); See also, **Act of April 26, 1906**, Chap. 1876, §28, 34 Stat. 137, 148 (1906)(this act is an example of the method congress has used to require Secretarial approval of tribal legislation, no similar act applies to the Navajo Tribe of Indians); **Indian Civil Rights Act of 1968**, 25 **U.S.C.** §1301, et. seq.(this act is an example of the method Congress has used to limit the tribe's powers of self government. However, in this act, Secretarial approval of tribal legislation was not required. See, **Santa Clara Pueblo v. Martinez** 426 U.S. 49, 56-57, 56 L.Ed.2d 106, 114

(1978)). Further, tribal exercise of the powers to tax, non-Indians when their conduct within the tribal jurisdiction has some effect on Indian interests has never been invalidated or limited as inconsistent with any stated national interests by a federal appellate court. **Merrion v. Jicarilla Apache Tribe** 455 U.S. 130, 71 L.Ed.2d 21 (1982); **Washington v. Confederated Tribes** 447 U.S. 134, 65 L.Ed.2d 10 (1980); **Montana v. United States** 450 U.S. 544, 67 L.Ed.2d 493 (1981); **Worcester v. Georgia** 31 U.S. (6 Pet.) 515 , 8 L.Ed 483 (1832); 15 **U.S.C.S.** §§3320(a), (c)(1). In fact, in both the National Gas Policy Act of 1978, 15 **U.S.C.S.** §3320, and the Indian Tribal Government Tax Status Act of 1982, 26 **U.S.C.** §7871, et cet., tribal taxation is explicitly recognized by the Congress. In the National Gas Policy Act, tribal severance taxes are authorized on an equal footing with state severance taxes in 1978 — four years prior to this Court confirming that Indian tribes have the authority to levy such taxes, and, in the Indian Tribal Government Tax Status Act, tribal taxes generally are recognized as eligible for deduction

for federal income tax purposes on an equal footing with state taxes without any indication of the supposed requirement that these taxes be approved by the Secretary of the Interior prior to implementation.[9] Simply stated, if there are to be limitations imposed upon the authority of Tribal governments, it is the exclusive province of the Congress to explicitly impose those limitations, and the Congress has not seen fit to do so in this case. **Merrion v. Jicarilla Apache Tribe** 455 U.S. 130, 147, 71 L.Ed.2d 21, 36 (1982); **White Mountain Apache Tribe v. Bracker** 448 U.S. 136, 65 L.Ed.2d 665 (1980); **Santa Clara Pueblo v. Martinez** 436 U.S. 49, 56 L.Ed.2d 106 (1978); **United States v. Wheeler** 435 U.S. 313, 55 L.Ed.2d 303 (1978); **Talton v. Mayes** 163 U.S. 376, 41 L.Ed 196 (1896).

Congress has, in fact, consistently opposed the exercise of such powers as petitioner Kerr-McGee here advocates for the Secretary of the Interior. As early as 1833, and continuing thereafter, the Commissioners of Indian Affairs, and the Secretary of the Interior had requested from Congress specific authority to create codes of laws for, veto the actions of, and act as magistrates for the Indian Tribes.[10] The Indian Reorganization Act itself, 25 **U.S.C.** §§465, et. seq., was designed

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9. The Natural Gas Policy Act states in pertinent part at 15 U.S.C. §3320(c): **"Definition of State severence tax.** For purposes of this section, the term "State severance tax" means any severance, production, or similar tax, fee, or other levy imposed on the production of natural gas — (1) by any State or Indian Tribe." If Congress had intended such authorized and recognized Tribal severance taxes to be approved by the Secretary of the Interior prior to becoming effective, then, under any recognized rule of statutory construction, the Congress also intended State severence taxes to be approved by the Secretary of the Interior prior to becoming effective.

10. See, Rep. Comm. Ind. Aff. 1833 p. 186 (Commissioner Herring); Rep. Comm. Ind. Aff. 1838 p. 424 (Commissioner Crawford); Extract from Report of the Secretary of the Interior, 1865, p. IV in Rep. Comm. Ind. Aff. 1865 (Interior Secretary Harlan); Rep. Comm. Ind. Aff. 1877 pp. 1-2 (Commissioner Hayt); Rep. Comm. Ind. Aff. 1886 p. XXVII (Commissioner Atkins); See, also, Rep. Comm. Ind. Aff. 1889 p. 26 (reporting the establishment of Courts of Indian Offenses in 1882 without the benefit of Congressional approval or authorization, even in light of the many previous requests for such authority), and **Santa Clara Pueblo v. Martinez** 436 U.S. 49, 68-69, 56 L.Ed.2d 106, 119-120 (1978) where this Court discusses another attempt by the Interior Department to obtain Congressional approval to review the governmental actions of Indian tribes — an attempt which was rejected by the Congress.

not to limit the authority of traditionally based tribal governments, but to get the Secretary of the Interior out of tribal self-government into which he had intruded by his unwarranted assumption of administrative powers. Ziontiz, After Martinez: Civil Rights Under Tribal Government, 12 Univ. Calif. Davis L. Rev. 1, 31-33 (1979); Senate Comm. on Indian Affairs, Report No. 1080, 73rd Cong., 2nd Sess., 3-4 (1934); Hearings on S. 2755 and S. 3645, Senate Comm. on Indian Affairs, 73rd Cong., 2nd Sess., pt. 2, p. 256 (1934); H.R. Rep. No. 1804, 73rd Cong., 2nd Sess., p. 8 (1934); **Morton v. Mancari** 417 U.S. 535, 41 L.Ed.2d 290 (1974).

Not only is it clear that the Secretary does not claim review power over the levy and collection of tribal taxes without some specific authority to do so, but it is also clear that the Indian Tribes affected, and the Bureau

of Indian Affairs, and the Congress, and the Congressional Task Force commissioned to review Federal Indian policy, and the Interior Department's most noted scholar in the field of Indian law, and the President as explained in his Indian Policy Statement[11] are of the view that the Secretary of the Interior has no such inherent review authority. "[J]ust as established practice may shed light on the extent of power [granted to a federal agency], so the want of assertion of power by those who presumably would be alert to exercise it, is . . . significant in determining whether such power was actually conferred."

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11. Indeed, The President's Commission on Indian Reservation Economies, in its Report and Recommendations to the President of the United States dated November 30, 1984, at page 16 of Part Two, identifies jurisdictional disputes between Tribes and State and local governments as the second most pervasive obstacle to the development of private sector business and industry within the Indian Country. The President's Commission, at page 34 of Part One of its report, and in other statements scattered throughout, has recommended that federal law be returned to Mr. Chief Justice Marshall's position that the laws of a State can have no force within the Indian Country, and that the return be prompted by legislation if necessary. This position appears to be four-square with the policy of Congress, See, Indian Self-Determination Act, 25 U.S.C. §§450, 450a, the Indian Child Welfare Act, 25 U.S.C. §§1901 et. seq. and particularly §1911(a)(b) and the other recent legislation cited herein.

FTC v. Bunte Brothers 312 U.S. 349, 85 L.Ed 881 (1941); **BankAmerica Corp. v. United States** ___ U.S. ___, 76 L.Ed.2d 456 (1983). In the absence of a specific statutory grant of authority from the Congress, or a grant of authority arising from the internal laws of the Tribe involved, the Secretary of the Interior has no authority to require approval of tribal government actions through his office prior to their validity.

CONCLUSION

In a myriad of cases throughout the years, this Honorable Court has determined that the Treaty guarantees to self-government, Treaty with the Navajo, June 1, 1868, Article 2,15 Stat. 667, and the interests of the Tribe and the Federal government in securing to the Navajo Tribe its ability to exercise its sovereign functions is so pervasive as to pre-empt State taxes upon all legal entities doing business within the Indian Country subject to the jurisdiction of the Navajo Tribe of Indians, and to require that those persons resort to the tribal courts established by legislation of the Navajo Tribal Council

in resolving disputes between themselves and members of the Navajo Tribe which arise within the tribal jurisdiction. **Ramah Navajo School Bd. v. Bureau of Revenue** 458 U.S. 832, 73 L.Ed.2d 1174 (1982); **Warren Trading Post v. Arizona Tax Commission** 380 U.S. 685, 14 L.Ed.2d 165 (1965); **McClanahan v. Arizona State Tax Commission** 411 U.S. 164, 36 L.Ed.2d 129 (1973); **Williams v. Lee** 358 U.S. 217, 3 L.Ed.2d 251 (1959).

Petitioner Kerr-McGee invites this Court to create a new rule of administrative law exclusively for Indian Tribes vesting general supervisory authority over tribal governments and tribal legislation in the Secretary of the Interior. If the Congress desires that tribal government and legislation be subject to the approval of the Secretary of the Interior, it is clear that the Congress knows how to impose such a requirement upon the Tribe. **United States v. McGowan** 302 U.S. 535 (1938); **Blue Jacket v. Commissioners** 72 U.S.(5 Wall.) 737, 757, 18 L.Ed 667, 673 (1867); **Yellow Beaver v. Commissioners** 72 U.S. (5 Wall.) 757, 18 L.Ed. 673 (1867); **United States v. Nice** 241 U.S. 591, 598, 60 L.Ed 1192, 1195 (1916).

See also, **National City Bank v. Republic of China** 348 U.S. 356, 358, 99 L.Ed 389, 395 (1955).

This Honorable Court is urged to hold that the Navajo taxes at issue here are valid and enforceable.

Respectfully Submitted

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December 26, 1984

No. 84-68

IN THE
SUPREME COURT OF THE UNITED STATES

OCTOBER TERM 1984

KERR-McGEE CORPORATION,
PETITIONER,

-vs-

NAVAJO TRIBE OF INDIANS,
RESPONDENTS.

AFFIDAVIT OF SERVICE

Cleveland County }
} ss.
State of Oklahoma }

F. BROWNING PIPESTEM, being first duly sworn, deposes and says:

1. That he is an active member of the Bar of this Court, and that he is an attorney for the amicus curiae Sac and Fox Tribe of Indians of Oklahoma.

2. That the Brief of Amicus Curiae and Motion to File Brief of Amicus Curiae to which this Certificate

is attached has been served upon all counsel of record for the parties in this cause in accordance with the provision of Rule 28 of the Rules of this Court by placing three copies of the same in the United States mail, first class postage prepaid, properly addressed this 26th day of December, 1984, to each of:

Alvin H. Shrago, Esq.
EVANS, KITCHEL & JENCKES, P.C.
2600 North Central Avenue
Phoenix, Arizona 85004-3099

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NAVAJO NATION DEPARTMENT OF JUSTICE
P.O. Drawer 2010
Window Rock, Arizona 86515

3. That the foregoing represents service on all parties required to be served under the provisions of Rule 28 of this Court.

4. That to my own personal knowledge and pursuant to Rule 28.2 of the Rules of this Court, forty copies of this Brief of Amicus Curiae and the Motion to file this Brief of Amicus Curiae which is bound at the beginning of this document, were mailed first class postage prepaid properly addressed to the Clerk of the

Supreme Court of the United States on this 26th day of December, 1984, which is within the time allowed for filing this brief under the Rules and orders of this Court.

s/F.Browning Pipestem
F. Browning Pipestem

Subscribed and sworn to before me this 26th day of December, 1984.

[Seal]

s/William Giessman
Notary Public

My Commission Expires: April 8, 1986